2003

State of Utah v. Rameen Rey Amirkhizi : Brief of Appellant

Utah Court of Appeals

attorney general\'s office; attorney for appellee.
Loni F. DeLand, Michael R. Sikora; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. RAMEEN REY AMIRKHIZI, Defendant/Appellant.	:	BRIEF OF APPELLANT Case No. 20030639

Appeal from a Judgment and Conviction to Two Counts of Possession of a Controlled Substance, Third Degree Felonies, Utah Code Ann. § 58-37-8(2)(a)(i), Third District Court, Summit County, the Honorable Bruce C. Lubeck, Presiding

LONI F. DeLAND (0862)
MICHAEL R. SIKORA (6986)
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 364-1333
Lawyers for Appellant

Utah Attorney General's Office
Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854
Lawyer for Appellee

Oral Argument and a Published Decision are Requested

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. RAMEEN REY AMIRKHIZI, Defendant/Appellant.	: : : : :	BRIEF OF APPELLANT Case No. 20030639

Appeal from a Judgment and Conviction to Two Counts of Possession of a Controlled Substance, Third Degree Felonies, Utah Code Ann. § 58-37-8(2)(a)(i), Third District Court, Summit County, the Honorable Bruce C. Lubeck, Presiding

LONI F. DeLAND (0862)
MICHAEL R. SIKORA (6986)
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 364-1333
Lawyers for Appellant

Utah Attorney General's Office
Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854
Lawyer for Appellee

Oral Argument and a Published Decision are Requested

Table of Contents

Table of Authorities

Page

Cases

State Statutes

Other Authority

Statement of Jurisdiction

This is an appeal brought by appellant Rameen Amirkhizi from a judgment and conviction on two counts of possession of a controlled substance, third degree felonies, under Utah Code Ann. § 58-37-8(2)(a)(i). Amirkhizi entered pleas of guilty after the trial court denied his motion to suppress and, pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), he reserved his right to appeal the denial of the motion. **(R. at 61, 62, 80)** The appeal is brought under Utah Code Ann. § 77-18a-1(1)(a). The Utah Court of Appeals invokes appellate jurisdiction over this matter pursuant to Utah Code. Ann. § 78-2a-3(2)(e).

Statement of the Issue and Standards of Review

Issue 1. Whether the district court erred in holding that EMT Mohler's search of Amirkhizi's backpack was not a "private search" and was therefore not done in violation of the Fourth Amendment. *Standard of Review*. In State v. Ellingsworth, 966 P.2d 1220 (Utah Ct. App. 1998), this court was asked to decide whether conduct by employees of the Workers' Compensation Fund constituted state action. Although not stated explicitly, it appears that the issue was treated as most Fourth Amendment issues are treated: although questions of law are reviewed for correctness, there may be factual findings that bear on the issue. The appellate court will review factual determinations made by a trial court with

deference. State v. Loya, 2001 UT App. 3, ¶6, 18 P.3d 1116; see also State v. Pena, 869 P.2d 932, 935-36 (Utah 1994) (thoroughly analyzing standards of review of Fourth Amendment issues).

Issue 2. Whether the officer who searched the backpack, against Amirkhizi's wishes, violated the Fourth Amendment by failing to obtain a search warrant. *Standard of Review*. This is a mixed question of fact and law. Factual determinations made by the district court are reviewed under the clearly erroneous standard. Legal conclusions are reviewed for correctness, with some discretion given to the application of the legal standards to the underlying factual findings. State v. Loya, 2001 UT App. 3, ¶6, 18 P.3d 1116.

Issue 3. Whether the district court erred in finding that the contraband would have been inevitably discovered because police had probable cause to arrest Amirkhizi based on information provided by the EMT. As with the two preceding issues, this is a mixed question of fact and law. Factual determinations made by the district court are reviewed under the clearly erroneous standard. Legal conclusions are reviewed for correctness, with some discretion given to the application of the legal standards to the underlying factual findings. Id.

Relevant Constitutional Provisions, Statutes, and Rules

U.S. Const. Amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

Statement of the Case

On September 18, 2002, Amirkhizi was involved in a one-car accident on Interstate 80 in Summit County. Police officers and an ambulance arrived on the scene. Amirkhizi, who was not badly injured, reluctantly agreed to be taken to the hospital by ambulance. A subsequent search of Amirkhizi's backpack and vehicle revealed narcotics and paraphernalia.

The state charged Amirkhizi in a four-count information: Count I, possession of a controlled substance (cocaine), a third degree felony; Count II, possession of a controlled substance (methamphetamine), a third degree felony; Count III, possession of a controlled substance with intent to distribute (marijuana), a third degree felony; Count IV, possession of drug paraphernalia, a class B misdemeanor.

After the preliminary hearing, Amirkhizi filed a motion to suppress evidence **(R. 20-21)** arguing that the EMT, who initially searched Amirkhizi's backpack, was a state actor for Fourth Amendment purposes and that the search he conducted

of the backpack went well beyond the limited permission Amirkhizi had provided to simply place Amirkhizi's key in the backpack. Second, Amirkhizi argued that the search of his car by the police was not justified by the automobile exception to the warrant requirement and was therefore illegal.

The trial court denied the motion to suppress (R. 49-54), and Amirkhizi entered a conditional plea of guilty to Count I and Count II of the information, reserving his right to appeal the denial of the motion. Count III and Count IV were dismissed as part of the plea bargain.

Statement of Facts[1]

On September 17, 2002, EMT Dexter Mohler responded to a call indicating there had been a one-car accident on Interstate 80. Mohler is an on-call employee of the Evanston (Wyoming) Fire Department and Ambulance Service, which is run by the county. (Preliminary Hearing Transcript at 2, 10-11) [Hereinafter "T."]

In December of 1999, Mohler received training from the Uintah County, Wyoming sheriff's office and the Wyoming Department of Criminal Investigations

---

[1] At the preliminary hearing, there was some problem with the recording equipment during the defense cross-examination of Trooper Brian Davis of the Utah Highway Patrol. Where indicated, the parties have stipulated that the facts set forth in this Statement of Facts accurately reflect Davis' testimony on cross-examination.

on drug awareness and drug recognition. Part of this training was provided by a "strike force" made up of local police officers. (T. at 7, 17)

At the accident scene, at mile post 196 in Summit County, Utah, Mohler found one patient standing next to the car with the driver's door open. The patient, Rameen Amirkhizi, had minor injuries and was able to walk. Reluctantly, Amirkhizi agreed to go the emergency room. He climbed on the gurney and was placed in the ambulance. (T. at 2-3, 26)

Amirkhizi had a backpack with him and asked Mohler to get the keys from the car because he needed his work keys that were on the same ring. Mohler asked if Amirkhizi would like the keys placed in the backpack and Amirkhizi agreed. Mohler opened the side pocket of the backpack and saw a prescription pill bottle. When he opened the bottle, Mohler found a capsule and a baggie with powder in it. Mohler opened another pocket of the backpack and found syringes. (T. at 4-6)

Amirkhizi, who already had the backpack with him, was immobilized on the gurney and inside the ambulance when he asked Mohler to get the keys. (T. at 11-12)

Mohler opened the prescription bottle because he was "curious" to see what was inside. At no time before or after discovering the contents of the bottle did Mohler ask whether Amirkhizi had taken any drugs or medication. (T. at 13-

14)

After inspecting the contents of the backpack, Mohler placed the items back into the backpack, zipped it shut, and informed a Deputy Chandler, who was already on the scene, of what he had discovered. (Stipulated Facts, R. 33-34)

When Trooper Brian Davis of the Utah Highway Patrol arrived at the scene, he assumed it was nothing more than an injury accident situation. (T. at 26)

Deputy Chandler told Trooper Davis about Amirkhizi's "known drug history." No specifics or details about the alleged drug history were provided to Trooper Davis.[2] Chandler also told Davis that when Amirkhizi was being loaded onto the stretcher, Chandler offered to carry the backpack to the ambulance and Amirkhizi refused, pulling it away. (T. at 26-27; Stipulated Facts, at R. 33-34)

Chandler then told Deputy Davis what EMT Mohler had discovered in the backpack. Without ever speaking to Mohler directly, Davis got in the ambulance to talk with Amirkhizi. Amirkhizi refused to give his consent for a search of the backpack. (T. at 27; Stipulated Facts, R. 34)

Believing he had probable cause to search the backpack, Davis seized the backpack from Amirkhizi and found most of the items that form the basis of this prosecution. (T. at 27) Amirkhizi was then arrested. His car was searched with

---

[2] Amirkhizi denies any criminal history involving drugs, and no information to the contrary has been provided to the defense in discovery.

a drug canine, and the dog alerted on marijuana residue. (Stipulated Facts, R. 35)

Trooper Davis "determined" that he did not need to obtain a search warrant because the "unusual circumstances" of the case, including Mohler's information about the contents of the backpack *and* Amirkhizi's refusal to give consent, constituted an exception to the warrant requirement. (Stipulated Facts, R. 34-35)

Summary of the Argument

EMT Mohler, who searched Amirkhizi's backpack at the scene of the crash, did not conduct the search for a legitimate non-law enforcement purpose. He admitted he was looking for drugs and weapons. (T. at 16-17) He testified he had received training in drug recognition and interdiction by Wyoming police, and had been encouraged by Wyoming police in those efforts. Mohler never asked Amirkhizi about what was contained in the backpack. Mohler's conduct constituted state action and his search of the backpack violated the Fourth Amendment.

The warrantless search of the backpack by Trooper Davis was unlawful because even if Davis had probable cause, his justification that "unusual circumstances" allowed him to dispense with a warrant does not provide a proper basis to uphold the search. There is no exception to the warrant requirement that

permitted Davis to make a warrantless search of the backpack.

Finally, the inevitable discovery doctrine does not apply to this case. Even if Trooper Davis had probable cause to arrest Amirkhizi, there was no showing made by the state that arrest was inevitable – that it *would* have occurred. Indeed, Davis had alternative courses of action available to him, such as securing the backpack until a search warrant could be obtained or getting a telephonic warrant, that would not have required him to arrest Amirkhizi but would have preserved the integrity of the evidence. Davis did not testify that he was going to place Amirkhizi under arrest. The district court simply made that assumption in the absence of any evidence in the record.

Argument

A. EMT Mohler's search of Amirkhizi's backpack was not a "private search" and was done in violation of the Fourth Amendment.

As a county employee with police training in drug recognition and awareness, EMT Mohler's exploration of the contents of Amirkhizi's backpack cannot be viewed as a private search. Mohler engaged in state action for purposes of the Fourth Amendment, and his warrantless search of the backpack violated Amirkhizi's rights to be free from unreasonable searches and seizures.

"The decisions of [the Supreme] Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime." Michigan v. Tyler, 436 U.S. 499, 504 (1978). The Fourth Amendment protects individuals from "arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). In Tyler, the fire department arrived to put out the fire of a burning furniture store. After the fire had been extinguished, fire fighters returned to the store and collected items thought to be evidence of arson. The Court held that entry without a warrant violated the Fourth Amendment:

> [T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.

436 U.S. at 506.

Accordingly, in holding that the Fourth Amendment applies to searches conducted by public school officials in New Jersey v. TLO, 469 U.S. 325, 335 (1985) (parallel citations omitted), the Supreme Court observed:

> It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. See

> United States v. Chadwick, 433 U.S. 1, 7-8 (1977); Boyd v. United States, 116 U.S. 616, 624-629 (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"--that is, "upon the activities of sovereign authority." Burdeau v. McDowell, 256 U.S. 465, 475 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see Camara v. Municipal Court, 387 U.S. 523, 528 (1967), Occupational Safety and Health Act inspectors, see Marshall v. Barlow's Inc., 436 U.S. 307, 312-313 (1978), and even firemen entering privately owned premises to battle a fire, see Michigan v. Tyler, 436 U.S. 499, 506 (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in Camara v. Municipal Court, supra, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U.S., at 528. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," Marshall v. Barlow's, Inc., supra, 436 U.S., at 312-313, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Camara v. Municipal Court, supra, 387 U.S., at 530.

Utah appellate courts have had a limited opportunity to analyze state action questions with respect to application of the Fourth Amendment. In State v. Ellingsworth, 966 P.2d 1220 (Utah Ct. App. 1998), employees of the Workers' Compensation Fund (WCF) provided medical records to the Utah Attorney General for a possible workers' compensation fraud prosecution. The WCF claims adjustor, whose duties included determining the compensability of claims,

assuring appropriate medication and treatment, and determining when a claimant could return to work, noted defendant's mounting bills and other problems in the file. Accordingly, the adjustor decided to send defendant to an independent physician to review her medical history. The adjustor then received defendant's consent to obtain her medical records, which were forwarded to the independent physician. The independent physician concluded that defendant's pain was not related to her accident. The adjustor also provided the defendant's medical information to the WCF's investigation department, which sent it on to the attorney general. Id. at 1221-22.

On appeal, the Ellingsworth court observed that the "relevant authority under the Fourth Amendment focuses not on whether a state actor is involved, but on whether non-law enforcement government employees' acts are 'state action' subject to the Fourth Amendment strictures." Id. at 1222. The court noted that in prior cases the Utah Supreme Court had adopted a two-part test to make state action determinations with respect to private, non-government conduct. Id. at 1224. The court in Ellingsworth held that the same test applies to non-law enforcement government agents. Id. at 1225. Accordingly, the inquiry must focus on (1) the government's knowledge of and acquiescence to the conduct of the party performing the search, and (2) the intent of the party performing the search. Id. at 1224. The court concluded that the WCF did not engage in state

action because WCF agents investigated the defendant's claims solely to determine if she was eligible to receive benefits, and did so without any direction or instruction from the attorney general. Second, with respect to the intent of the party conducting the search, the WCF "had a purpose completely independent of law enforcement," in that the agency investigated defendant's claim "for its own benefit and without law enforcement involvement." Id. at 1225.

When a non-law enforcement government employee works hand-in-glove with police, and is actually trained by police in narcotics interdiction, as happened in the case at bar, the existence of "state action" becomes readily apparent. Accordingly, it has been held that the exclusionary rule should apply to police dispatchers because dispatchers, although not law enforcement officers, are clearly an "'adjunct[] to the law enforcement team engaged in the often competitive exercise of ferreting out crime.'" See United States v. Shareef, 100 F.3d 1491, 1502-03 (10th Cir. 1996).

Government conduct, rather than purely private conduct, triggers the protection of the exclusionary rule in criminal cases. However, government conduct is not limited to the acts of police officers or agencies. The policy has been expressed as follows:

> What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure

> of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'

Soldal v. Cook County, Ill., 113 S.Ct. 538, 548 (1992) (citations omitted).

In United States v. Attson, 900 F.2d 1427, 1433 (9th Cir.), cert. denied, 498 U.S. 961 (1990), the court concluded that "for the conduct of a governmental party to be subject to the Fourth Amendment, the governmental party engaging in that conduct must have acted with the intent to assist the government in its investigatory or administrative purposes and not for an independent purpose."

Applying the forgoing to the search by EMT Mohler, after finding the prescription bottle in the pocket where he deposited the keys, Mohler decided to open another pocket because he was concerned about other problems, such as whether the backpack contained any *weapons* or other drugs. (T. 16-17) Of course the presence of weapons had nothing to do with Amirkhizi's medical condition. The only logical inference from Mohler's testimony on this point is that his weapons inquiry was directly related to a criminal drug investigation. Mohler also explained that as an EMT he had been involved in other criminal cases where he head provided evidence to the police and that the police had encouraged him to continue in that capacity. (T. 18) Mohler's intent at this point

is clearly directed toward a law enforcement goal. In the second pocket Mohler discovered a syringe. (T. 6) He then zipped up the backpack, with the items he had found still inside. Mohler next talked to the nurse who was part of the ambulance team. Mohler told the nurse that he had "found some syringes in the pack as well as some other things." This information was provided, according to Mohler, in order to give the nurse "a heads up to be a little more cautious with the patient and maybe give him a line of questioning to talk to the patient about what was in the pack." (T. 6) The record contains only these vague statements about the information transmitted by Mohler to the nurse. It is impossible from this testimony to conclude that Mohler's intent was to provide information relating to Amirkhizi's treatment. Mohler apparently did not tell the nurse he had found both prescription drugs and what he suspected was cocaine. There is no indication from the record that Mohler informed the nurse about the condition of the syringes. In other words, if a syringe showed evidence of use this would provide a legitimate concern that such use was recent. Most importantly, Mohler simply did not testify that he provided this vague information to the nurse for purposes of diagnosis and treatment. In fact, Mohler stated, in police-officer-speak, that it was his desire to give the nurse a basis for "a line of questioning" regarding the contents of the pack; this testimony, combined with Mohler's baseless concern about weapons, demonstrates that his true intent or motivation was drug

interdiction. Mohler's conduct was not consistent with a concern for the proper treatment of the patient with the benefit of all relevant information.

Although Amirkhizi was in the ambulance when Mohler searched the backpack, and the backpack had been placed between the front seats, Mohler never asked Amirkhizi any questions about what he had found. (T. 13-14) Mohler told the nurse to be "cautious" and then sought out a Wyoming trooper and a Utah deputy, explaining what he had discovered in rummaging through the pack. (T. 6)

Such was clearly the case here. EMT Mohler works for the county, and his duties often put him alongside police officers during and in relation to various police investigations. He testified that, as an EMT, he has received training in drug awareness and drug recognition from the sheriff's office in Evanston as well as from the Wyoming Department of Criminal Investigations. The only reason he had for unzipping the outer pocket of the backpack was to deposit the keys. By that point, Amirkhizi was immobilized, strapped on to the gurney, and could not put the keys in the backpack himself. Mohler, out of "curiosity", took it upon himself to scrounge around in the backpack, and actually removed the pill container from inside of the pack, opened it up, and inspected the contents; he could not have been aware of the name on the container before removing it. Then Mohler opened yet another compartment of the backpack and inspected

additional items.

EMT Mohler's search of the backpack clearly violated Amirkhizi's expectation of privacy. The only purpose for even touching the backpack was to do Amirkhizi a favor and deposit the keys. Instead, this gesture turned into a warrantless search by a government agent who just happened to have drug awareness and drug recognition training.

In sum, Mohler's conduct constituted state action under the Fourth Amendment. He illegally searched Amirkhizi's backpack in violation of the Fourth Amendment in the absence of a well-recognized exception to the warrant requirement, and the district court erred in not suppressing the evidence.

B. Even if Trooper Davis had probable cause to search the backpack, no exception to the warrant requirement permitted him to do a warrantless search.[3]

If Amirkhizi prevails on the first issue, then the poisonous tree doctrine ends the analysis since Trooper Davis' subsequent conduct, the search of the backpack and the car, was based entirely on the tainted information provided by EMT Mohler. However, even if EMT Mohler did not violate the Fourth

---

[3] The district court concluded that a warrantless search was *not* justified by an exception to the warrant requirement. This section is included in the brief in the event the state attempts to claim that a recognized exception to the warrant requirement *does* apply.

Amendment, the evidence should be suppressed because Trooper Davis was obligated to obtain a search warrant upon learning from the other officer about the contents of the backpack. The search of the backpack was not done incident to arrest, since Amirkhizi was not yet under arrest, and Davis did not have probable cause to make an arrest at that point. In addition, the search could not be done as part of the automobile exception because even if the officer had probable cause to search, the item to be searched was the backpack and not the vehicle. The backpack, of course, was no longer in the car when EMT Mohler scavenged through it, nor was it in Amirkhizi's vehicle when the trooper later initiated his "unusual circumstances" search.

On cross-examination at the preliminary hearing, Trooper Davis testified that the "unusual circumstances" of the case permitted him to search the backpack without first obtaining a search warrant. (Stipulated Facts ¶ 10, R. 34, 35) Trooper Davis' opinion, however, does not even remotely reflect any accepted view of the Fourth Amendment.

It is a core principle that "reasonableness" is the touchstone for determining the constitutionality of a search. Florida v. Jimeno, 111 S.Ct. 1801, 1803 (1991). However, "a warrantless search is reasonable only when it falls within one of the clearly defined exceptions to the warrant requirement." Id. 1803. "As such, precedent neither establishes nor condones application of an

amorphous 'reasonableness' test to determine the constitutionality of a warrantless search. United States v. Bute, 43 F.3d 531, 534-35 (10th Cir. 1994). ""[T]he few situations in which a search may be conducted in the absence of a warrant have been carefully delineated." Arkansas v. Sanders, 442 U.S. 753, 760 (1979). The state cannot show that the "unusual circumstances" justification is a clearly established exception to the warrant requirement, as would be required to uphold the search of the backpack by Trooper Davis.

Even assuming that EMT Mohler did not violate the Fourth Amendment when he engaged in state action as a county employee by scrounging around in the backpack to satisfy his curiosity, circumstances did not permit Trooper Davis to dispense with the warrant requirement. First, as the district court found, Davis did not have consent to search the backpack. (R.at 52) After Mohler discovered what he believed was contraband in the backpack, he returned the items to the backpack and zipped it up. A short time later, Trooper Davis asked Amirkhizi for permission to search the backpack. Amirkhizi adamantly refused. (R. at 51) It is beyond serious argument that, not withstanding Trooper Davis' view of the law, refusal to give consent does *not* provide probable cause to search.

Second, even if Trooper Davis had probable cause to search the backpack, based on the second-hand information given to him by Officer Chandler, the law required issuance of a warrant before a search could take place. The state has

the burden of justifying a warrantless search by demonstrating a recognized exception to the warrant requirement. As the district court properly concluded, no exception applies to this case. (R. at 53) Davis merely explained that "unusual circumstances" permitted him to search.

At bottom, well-established exceptions to the warrant requirement are intended to limit independent officer discretion. Trooper Davis' non-existent "unusual circumstances" test places the law on its head and stands in lonely opposition to decades of precedent.

In sum, probable cause to search, even if present, was not a sufficient justification to make a warrantless search of the backpack. Because no recognized exception to the warrant requirement exists in this case to validate Trooper Davis' search of the backpack, all evidence discovered and seized stemming from the unlawful search must be suppressed.

C. The trial court erred in ruling that the evidence in the backpack would have been inevitably discovered upon Amirkhizi's arrest.

Even though the district court correctly found that no exception to the warrant requirement justified Trooper Davis' search of the backpack, the court held that the exclusionary rule did not apply because the evidence would have been inevitably discovered. Without providing the applicable standard to the

inevitable discovery doctrine, the court justified invocation of the rule as follows:

> Davis had the necessary information to arrest defendant, even before looking into the backpack. He had been advised that the backpack contained syringes and possibly cocaine. Based on that information from the Wyoming officer alone Davis could have lawfully arrested defendant for possession of drug paraphernalia and possession of a controlled substance.
>
> * * * *
>
> The court concludes that the state has proven by a preponderance of the evidence that the evidence here would have been lawfully obtained by other means which means were lawful; that is, a lawful probable cause arrest followed by a search incident to arrest or inventory search.

(R. at 53)

The purpose of the exclusionary rule has been described as follows: "Court's view the exclusionary rule as a necessary deterrent to unlawful police behavior, one which prevents the police from benefitting from their illegalities." State v. Topanotes, 76 P.3d 1159, 1162 ¶ 13 (Utah 2003). Yet this rule is not meant to put police in a worse position than they would have been had no police illegality taken place. Id. The inevitable discovery doctrine "enables courts to look to the facts and circumstances surrounding the discovery of the tainted evidence and asks whether the police would have discovered the evidence despite the illegality." Id. at ¶ 14. Accordingly, "'If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably

would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.'" Id. (quoting Nix v. Williams, 467 U.S. 431, 444 (1984).

While some jurisdictions require an entirely separate and ongoing investigation before the inevitable discovery doctrine can be applied, the Utah Supreme Court has held that "an entirely independent, alternate, intervening, appreciably attenuated investigation aside from the tainted investigation" is not required in order to apply the rule. State v. James, 13 P.3d 576, 580-81 ¶¶ 15-16. Instead, as stated above, the standard is whether the evidence would have been discovered by lawful means. Still, the court in Topanotes emphasized that "[a] crucial element of inevitable discovery is independence; there must be some 'independent basis for discovery'" to use the evidence at trial, 76 P.2d at 1163 ¶ 16 (quoting United States v. Boatright, 822 F.2d 862, 865 (9th Cir. 1987). Accordingly, "'the fact or likelihood that makes the discovery inevitable [must] arise from circumstances other than those disclosed by the illegal search itself.'" Id. (quoting Boatright, 822 F.2d at 864-65).

All of this, of course, requires courts to "confidently . . . predict what would have occurred, but did not actually occur." Id. Analysis of an inevitable discovery problem, then, can require predictions not simply about how a person *might* have behaved, but how a person *would* have behaved. In Topanotes the court

warned: "Cases that rely upon individual behavior as a crucial link in the inevitable discovery chain . . . rarely sustain an inevitable discovery theory." 76 P.2d at 1164 ¶ 20. This can be speculation about the behavior of the police or some other individual that can break the chain of inevitability.

In the instant case, the district court speculated that, based only on the hearsay information received from the Wyoming officer about the contents of the backpack, Trooper Davis would have inevitably arrested Amirkhizi for paraphernalia drug offenses. This conclusion by the district court, however, has more to do with what Davis *could* have done, or what he might have been legally justified in doing. The enquiry, however, is what Trooper Davis *would* have done. And even though this required the court to make a prediction, the prediction had to be supported by the record. Yet there was no record evidence supporting the court's conclusion that Davis intended to arrest Amirkhizi after he learned from the Wyoming officer that the backpack possibly contained contraband.

The facts show instead that the Davis' focus was on searching the backpack, either with or without Amirkhizi's consent. Davis never testified that his intention was to arrest Amirkhizi. Indeed, on the witness stand the trooper stated that "unusual circumstances" permitted him to forego the process of getting a search warrant. Since the inevitable discovery doctrine requires a degree of speculation about future conduct and police procedure, it seems utterly

certain that Davis must have known that he could search Amirkhizi incident to arrest, and thus avoid the absurdity of justifying a search based on the non-existent "unusual circumstances" exception to the warrant requirement.

There was a reasonable and arguably more likely alternative to a custodial arrest of an injured suspect who would soon be on his way to the hospital. Indeed, Amirkhizi's identity was no mystery to the investigating officers, and permitting him to be taken to the hospital would have had no deleterious effect on the investigation. The important thing was to protect the backpack, which Trooper Davis could easily have done seizing and placing it in safe-keeping until a search warrant could be secured. Another alternative would have been to call a district court judge and obtain a telephonic search warrant[4] from the location of the accident. Thus Trooper Davis had at least three alternative courses of action that would have provided the state with the contraband inside the backpack.

The point is that Davis never stated his intention to arrest Amirkhizi, yet the district court simply assumed that a custodial arrest would have occurred prior to the search of the backpack.[5] Possible alternative courses of action become

---

[4] The requirements of a telephonic search warrant are set forth in Utah Code Ann. § 77-23-204.

[5] The transcript of the preliminary hearing does not indicate whether Amirkhizi was in fact placed under arrest at the scene of the accident, after Davis searched the backpack, or if the arrest came sometime later, either at the hospital

entirely relevant when inevitable discovery depends, as it does here, on individual behavior. It becomes even more difficult to predict the future conduct of Trooper Davis since his knowledge of Fourth Amendment procedures is, to say the least, imperfect. See Topanotes 76 P.2d at 1164 ¶ 21 ("While the situation *could* have developed in the manner hypothesized by the State, we are not persuaded that it *would* have led to legal discovery of the evidence in question."); see also State v. Robb, 605 N.W.2d 96 (Minn. 2000) (inevitable discovery not demonstrated where prosecution made an argument that the vehicle could have been impounded and inventoried since there was no showing that impoundment was the *only* alternative); State v. Raved, 777 A.2d 301 (N.J. 2001) (forced extraction of blood from defendant at hospital over his objection not admissible under inevitable discovery rule because no evidence hospital would have taken a blood test absent the police request and defendant did not even appear injured); State v. Milliorn, 794 S.W.2d 181 (Mo. 1990) (rejecting inevitable discovery theory premised on hypothetical inventory search since no witness for the state testified regarding routine inventory procedures for impounded vehicles).

Finally, the district court simply assumed that Trooper Davis had probable cause to arrest Amirkhizi in the first place, aside for the question of whether Davis

---

or after Amirkhizi's release from the hospital.

intended to make the arrest. Even assuming Davis had probable cause to search the backpack, this does not mean that he had probable cause to arrest Amirkhizi based only on hearsay information. As Professor LaFave has noted, "there may be probable cause to search without probable cause to arrest, and vice-versa." W. LaFave, 2 Search and Seizure: A Treatise on the Fourth Amendment § 3.1(b) at 9 (3rd ed. 1996). Professor LaFave continues:

> [P]robable cause to search a particular place may exist without there also being probable cause to arrest a person who occupies that place. Consequently, a search warrant is not rendered invalid because of a lack of grounds to arrest any particular person, nor is an arrest made lawful simply because there was probable cause for a search of the home of the person arrested.

Id. at 9-10.

The information provided to Trooper Davis could no more justify making an arrest under these circumstances than an arrest could be made based on the statement of an informant that the informant had just been inside someone's house and observed marijuana. See, e.g., United States v. Connoly, 479 F.2d 930 (9th Cir. 1973) (man arrested on the street for possession of narcotics told police the address of the home where he got the drugs; police were not justified in arresting the man and woman who lived at the home). EMT Mohler testified that the substance he saw in the backpack was "white powder" and "might have been a controlled substance" (T. at 5, 7) Mohler did not field test the substance,

he did not ask Amirkhizi any questions about it, and he did not show it to the police. (T. 15-16) Moreover, since he did not bother asking Amirkhizi about his health, for all Mohler new Amirkhizi could have been a diabetic, thus explaining the presence of the syringes. There were simply too many unanswered questions to support arresting Amirkhizi. Arguably, Trooper Davis knew this, which is why he wanted to search *before* making an arrest.

Conclusion

Based upon the foregoing facts and argument, Amirkhizi requests this Court to reverse the trial court's ruling denying the motion to suppress.

DATED this 20 day of November, 2003.

LONI F. DeLAND
MICHAEL R. SIKORA
Lawyers for Appellant

CERTIFICATE OF SERVICE

I certify that two (2) true and correct copies of the foregoing **Brief of Appellant** were hand-delivered or mailed on the 20 day of November, 2003 to:

Utah Attorney General's Office
Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854